SERVICE BY PUBLICATION IN SUIT INVOLVING EQUITABLE ASSIGNMENT OF INSURANCE POLICY

A took out a life insurance policy in the defendant company with his sister as beneficiary. Under the terms of the policy A was privileged to change the beneficiary without the assent of the beneficiary herself. Subsequently, in consideration of marriage, A agreed to substitute as beneficiary the plaintiff, his future wife. The policy was delivered to the plaintiff who thereafter paid the premiums. A died without having the policy changed. The plaintiff sued in equity to have herself declared the equitable owner of the policy and to have the proceeds paid to her, in which suit the defendant company and the beneficiary, a resident of Austria, who was served by publication, were made parties defendant.

The trial court dismissed the complaint,[1] but the decision was reversed by the Appellate Division.[2] The appellate court relied upon a decision of the Court of Appeals, *Morgan v. Mutual Benefit Life Ins. Co.*[3] In the latter case A took out a policy for $5,000, which was payable to his wife and, in case she died before him, to their children. Being unable to pay the premiums A and his wife assigned the policy by way of security to B, who paid the premiums, $4,500 in all. In a suit by B's administrator against the company and A's children, who had become beneficiaries under the policy and who were non-residents of the state and were served by publication, to impress a lien upon the policy for the amount of the premiums advanced, it was held that the action was in the nature of a proceeding *in rem* and that jurisdiction over the children had been acquired.

When the instant case came before the Appellate Division a second time the Court reversed itself by a vote of three to two,[4] the majority of the judges feeling constrained to do so by the decision of the Court of Appeals in the case of *Hanna v. Stedman*,[5] which had been rendered in the meanwhile. The proceeding in the *Hanna* Case was one of interpleader and it was held that jurisdiction could not be acquired over the non-resident claimant by publication.

It is submitted that the decision upon the first appeal in the *Schoenholz* Case was correct and that the *Hanna* Case is not opposed.

The principal case raises two questions of a fundamental character: (1) What solution does sound policy demand? (2) Is it possible to reach such solution under the existing law? As regards the first of

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[1] *Schoenholz v. New York Life Ins. Co.* (1919, Sup. Ct.) 106 Misc. 340, 175 N. Y. Supp. 684.

[2] (1920) 192 App. Div. 563, 183 N. Y. Supp. 251.

[3] (1907) 189 N. Y. 447, 82 N. E. 438.

[4] (1921, App. Div.) 188 N. Y. Supp. 596.

[5] (1921) 230 N. Y. 326, 130 N. E. 566.

these questions the answer leaves scarcely room for doubt. Unless the insurance company is permitted to bring in the Austrian beneficiary, it will be subject to another suit at the hands of such party. Being free from fault, sound policy would seem to require that the rights of the parties should be litigated in a single proceeding. The mere fact that one of the parties interested is a non-resident should not defeat this policy if the just rights of such party can be properly safe-guarded.

Is it possible to justify such a proceeding under the existing law? Here there may be differences of opinion. We are confronted in the first place with the fact that the common law has taken an extreme attitude in making jurisdiction depend upon personal service.[6] In England this requirement has been greatly relaxed in modern times, and if the action had been brought there, the Austrian beneficiary could have been made a party upon substituted service.[7] The power of the various states of this country to permit substituted service with reference to non-residents is restricted, however, by the Fourteenth Amendment to the Federal Constitution. *Pennoyer v. Neff*[8] has laid down the fundamental rule that judgments *in personam* cannot be rendered against a non-resident upon constructive service without violating the due process clause, the Supreme Court being of the opinion that any other rule would lead to fraud and oppression. But where there is property in the state and the proceeding is started by bringing such property under the control of the court by seizure or some equivalent act, i. e., where it is *in rem* or *quasi in rem,* substituted service is permissible.

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[6] In continental countries jurisdiction is never made to depend upon personal service. A personal suit may be brought always if the defendant has a domicil in the country. *France:* Code of Civil Procedure, art. 59; Garsonnet & Cézar-Bru, *Traité Théorique et Pratique de Procédure Civile et Commerciale* (3d ed. 1912) 845. *Germany:* Code of Civil Procedure, secs, 13, 16; 1 Gaupp-Stein, *Die Zivilprozessordnung für das Deutsche Reich* (11th ed. 1913) 58. *Italy:* Code of Civil Procedure, art. 90.

In addition to such general forum special *fori* exist as regards special classes of cases. For example, in Germany suit may be brought on contracts in the place where the contract is to be performed. Code of Civil Procedure, sec. 29; 1 Gaupp-Stein, *op. cit.* 88; 1 Petersen, *Die Civilprozessordnung für das Deutsche Reich* (5th ed. 1904) 69. In Italy jurisdiction exists either in the place where the contract was made or where it was to be performed. Code of Civil Procedure, art. 91, par. 1. As regards commercial matters, see also Code of Civil Procedure, art. 91, par. 2.

Special restrictions exist sometimes as regards foreigners. 5 Weiss, *Traité Théorique et Pratique de Droit International Privé* (2d ed. 1913) 314. The jurisdiction is, on the other hand, extended at times inordinately in favor of citizens, for example in France. French Civil Code, art. 14; 5 Weiss, *op. cit.* 69, 79.

Concerning the mode of citation where the defendant is without the state, see French Code of Civil Procedure, art. 69, sec. 10, modified by law of May 11, 1900; German Code of Civil Procedure, sec. 199; Italian Code of Civil Procedure, art. 142.

[7] Dicey, *Conflict of Laws* (2d ed. 1908) 243.

[8] (1877) 95 U. S. 714.

If it be asked: What is the distinction between an action *in personam* and an action *in rem* or *quasi in rem,* it is difficult to find an answer that is both accurate and comprehensive. The Supreme Court of the United States has defined a suit *in personam* as one in which "the entire object of the action is to determine personal rights and obligations of the parties."[9] As a broad descriptive statement this definition may be as good as any that can be framed, but it is manifestly too ambiguous to be of much value in the consideration of a particular case. Instead of attempting to operate with definitions, sound conclusions can obviously be more readily reached if we start with the power of a state with respect to all property found within its territory, which includes the power to define and to determine the rights of parties in or concerning such property, irrespective of the residence of such parties. That such power exists with respect to real property and chattels is universally conceded. The dispute relates merely to choses in action. A distinction might be made, of course, between tangible property on the one hand and intangible property on the other. Only the former has a physical situs; the latter can have a situs only in legal contemplation. The contention has been made by an eminent authority that a state has no power to authorize garnishment proceedings in the absence of personal service upon the non-resident creditor or voluntary submission on his part to the jurisdiction of the court.[10] This position is defensible from the standpoint of logic, but it does not meet the practical needs. Because of such practical considerations the Supreme Court of the United States has established the rule that for purposes of garnishment a debt is to be regarded as a thing, a *res,* wherever the garnishee is.[11]

If the state in which the garnishee is served has the power to extinguish the rights of the non-resident against such garnishee upon constructive service, it is not easy to see why the same power should not exist in other than garnishment proceedings, whenever the legislation in question seeks to provide a method for determining who of several claimants is the owner of a chose in action.[12] Granted the desirability of the end, there would appear to be no reason why such an extension should not be made. The ultimate test of what constitutes due process of law is the reasonableness of the legislation and such reasonableness is determined very largely with reference to the social needs in general. So far as the rights of the absentee are concerned, they need not be sacrificed in the least if the power of the state contended for be recognized. The Supreme Court has held in *Harris v. Balk*[13] that the gar-

[9] *Ibid.* 727.

[10] Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107, 120.

[11] *Harris v. Balk* (1905) 198 U. S. 215, 25 Sup. Ct. 625.

[12] See COMMENTS (1917) 27 YALE LAW JOURNAL, 252.

[13] *Supra* note 11.

nishee could avail himself of the judgment in the garnishment proceeding in a subsequent suit by his creditor, who had been served merely by publication, only if he had notified him of such proceedings, or if the creditor had otherwise notice thereof in time to protect his rights. For the protection of the non-resident served constructively the same condition should be applied to the insurance company in the case under consideration.

The final question to be determined is therefore whether the legislation of New York constituted a sufficient exercise of the power vested in the state to justify constructive service upon the Austrian beneficiary. The provision of the New York law relied upon in the cases is subdivision 5 of section 438 of the Code of Civil Procedure, which provides as follows:

"An order directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

"5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the State; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property."

The Court of Appeals having held in the *Morgan* Case[14] that the term "specific . . . personal property" included choses in action, it would seem that constructive service upon the Austrian beneficiary in the *Schoenholz* Case constituted due process of law.[15] Whether the plaintiff sues to "impress a lien" upon the insurance policy or seeks to recover the entire amount due under the policy by virtue of an assignment of such policy, can, in the light of the above discussion, produce no difference in the result. The *Hanna* Case,[16] on the other hand, is clearly distinguishable from the *Morgan* Case and the *Schoenholz* Case by the fact that the interpleader proceeding did not fall within the terms of section 438 of the New York Code of Civil Procedure. Similarly to the rule laid down in *Harris v. Balk* it should be held in the instant case, for the better protection of the absentee, that the insurance company shall not be privileged to avail itself, with respect to such absentee, of the judgment and payment thereunder unless it has notified such

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[14] *Supra* note 3.

[15] Under the New York practice, where judgment is given by default against a non-resident who is served by publication, the plaintiff is required to give an undertaking for restitution which will protect such absentee if he is subsequently admitted to defend the action and succeeds in his defence. Code of Civil Procedure, sec. 1216; Rules of Civil Practice, rule 192, subdiv. 5.

Concerning the time within which such absentee may be admitted to defend, see New York Code of Civil Procedure, sec. 445; Civil Practice Act, sec. 217.

[16] *Supra* note 5.

absentee of the pendency of the action or unless such absentee was otherwise informed of the proceedings within the statutory period during which non-resident defendants served by publication may come in and defend. E. G. L.

TAXATION OF SEATS ON THE STOCK EXCHANGE

The prevailing concept of "property" is often rudely tested in taxation cases. The rules laid down in statutes and decisions have often been constructed with the idea that property is a physical *res*—an object of sensation. As such, property would always have a *"situs"*—a relation in space to other objects of sense. But a chose in action is also property, although it is not a thing or *res*—an object of sense. Our concept of property has shifted; incorporeal rights have become property.[1] And finally, "property" has ceased to describe any *res,* or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities. Such is the case whether these relations affect the consumption and enjoyment of some particular object of sense or not.

It appears that the power of a state to levy a tax often depends upon the *"situs"* of property. We tax "property" whether it is tangible or intangible. Whenever the power to tax depends upon *situs,* we are compelled to find a *situs* for that which under accepted definitions can have none.

In *Anderson v. Durr* (1921) 42 Sup. Ct. 15,[2] the United States Supreme Court held that a seat on the New York Stock Exchange is property and may be taxed in Ohio, where its owner lived, without running counter to the Fourteenth Amendment, in spite of the fact that it may also be taxed in New York. Mr. Justice Pitney finds that membership in the Exchange includes the privilege of buying and selling in the Exchange building; the power of assignment "with qualifications"; a contractual right that the business of the association shall be conducted properly; a right that in dealings with other members commissions shall be determined by a definite rule; a privilege of holding oneself out in Ohio as a member and thereby inducing business; and some interest in the capital stock of a New York corporation owning the land and building in New York City, valued in excess of

[1] A right is never corporeal. Mr. Justice Holmes remarks in his dissent in the case now under discussion: "All rights are intangible personal relations. . . ." *Anderson v. Durr* (1921) 42 Sup. Ct. 15, 18. The same shift that occurred as to "property" no doubt also occurred as to "chose in action." A *chose* is a thing, and no doubt chose in action once meant some *specific* object of sense the possession and enjoyment of which might necessitate an action at law.

[2] Affirming (1919) 100 Ohio St. 251, 126 N. E. 57. See COMMENTS (1920) 29 YALE LAW JOURNAL, 916, discussing the Ohio decision and analysing the "property" involved.